BRB No. 02-0256

DAVID McCRACKEN Claimant-Respondent v. SPEARIN, PRESTON AND BURROWS, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: Dec. 12, 2002 DECISION and ORDER

Appeal of the Decision and Order and the Order on Motion to Reconsider and Supplemental Decision and Order on Fees and Costs of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Harvey Friedland (Hill, Friedland & Scarafone), Blue Bell, Pennsylvania, for claimant.

Michael J. Marone and Michael T. Herbert, Sr. (McElroy, Deutsch & Mulvaney, L.L.P.), Morristown, New Jersey, and Christian A. Davis (Weber, Goldstein, Greenberg & Gallagher), Philadelphia, Pennsylvania, for employer.

Sonya L. Levine (Eugene Scalia, Acting Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and

McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Order on Motion to Reconsider and Supplemental Decision and Order on Fees and Costs (2001-LHC-2162) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On February 3, 1997, claimant injured his back while working for employer, and employer voluntarily paid benefits for this injury. At some point in 2000, a dispute arose over the nature and extent of claimant's disability and claimant's average weekly wage, and in May 2001, claimant and employer filed Pre-Hearing Statements with the Office of Administrative Law Judges (OALJ). ALJ Exs. 1, 3. On May 29, 2001, the Court of Common Pleas for the Commonwealth of Pennsylvania placed The Reliance Insurance Company (Reliance), employer's carrier, in financial rehabilitation and appointed the Insurance Commissioner as Rehabilitator. In a letter dated July 2, 2001, the OALJ set October 29, 2001, as the date for the administrative hearing in this case. Prior to the hearing, however, on October 3, 2001, the Court of Common Pleas declared Reliance insolvent and placed it in liquidation. ALJ Ex. 5. Two days later, on October 5, 2001, Mr. Kawczynski, the attorney who had been representing Reliance and, by virtue of their relationship, employer, filed a letter with the administrative law judge informing him of Reliance's status and asking him to impose a 90-day stay on the longshore claim in accordance with the state court's Order of Liquidation. Claimant responded, indicating he had no opinion on the matter of the stay; the Director, Office of Workers' Compensation Programs (the Director), also responded, opposing the request. ALJ Exs. 5-7.

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[1]The court order stated:

> All proceedings in which Reliance is obligated to defend a party in any court of this Commonwealth are hereby stayed for ninety (90) days from the date of this Order. * * * With respect to suits and other proceedings in which Reliance is obligated to defend a party, pending outside the Commonwealth of Pennsylvania and in federal courts of the United States, this Order constitutes the request of this Court for comity in the imposition of a 90-day stay by such courts or tribunals, and that those courts afford this order deference by reason of this Court's responsibility for and supervisory authority over the rehabilitation of Reliance.

ALJ Ex. 5 attachment at para. 23.

On October 19, 2001, ten days before the scheduled hearing, the administrative law judge issued an order requiring all parties to appear at the hearing ready to argue the motion for a stay and the merits of claimant's case, if necessary. ALJ Ex. 9. According to employer, it received the administrative law judge's order on October 23, and it learned on October 25 that Mr. Kawczynski would not represent it at the hearing the following Monday, four days hence. In a final effort to postpone the hearing, employer faxed a letter to the administrative law judge on Friday, October 26, 2001, requesting a 30-day continuance to allow it time to retain a new attorney. The administrative law judge did not receive this communication until the morning of the hearing.

On October 29, 2001, Mr. Kawczynski and attorneys for claimant and the Director appeared before the administrative law judge. The administrative law judge informed these parties of employer's October 26 motion for continuance. Initially, however, he heard and granted Mr. Kawczynski's motion to withdraw from the case, agreeing with Mr. Kawczynski that an attorney cannot ethically represent a party who has not retained him. Tr. at 5-7. Thereafter, the administrative law judge discussed employer's motions for a stay and a continuance with claimant's attorney and the Director's attorney, informing them of his opinion that employer was in default for failing to appear before him. Accordingly, because no one was present to argue the motion, the administrative law judge deemed employer's motion to stay the case withdrawn. He also denied employer's motion for a continuance, and he declared employer in default, Tr. at 9-11, but he did not hear any testimony or admit any documentary evidence. On November 6, 2001, the administrative law judge issued a default judgment against employer, ordering it to pay claimant permanent total disability benefits, medical benefits and an attorney's fee. Decision and Order at 1-2. Employer, now represented by counsel, filed a motion for reconsideration on November 29, 2001, which the administrative law judge summarily denied. Employer appeals the decision, and claimant and the Director respond, urging affirmance.

Employer challenges the administrative law judge's decision on numerous grounds. It first contends the administrative law judge erred in failing to honor the request for comity in the state's liquidation order, relying on the Full Faith and Credit clause of the United States Constitution, U.S Const. art. IV, §1, and the Full Faith and Credit Act, 28 U.S.C. §1738. Employer also asserts that the administrative law judge erred in permitting Mr. Kawczynski to withdraw from the case because the

[2]According to employer, Mr. Kawczynski had been solely responsible for protecting carrier's and employer's interests in this case. He possessed the file, and he conducted the research and negotiations. Mr. Kawczynski stated at the hearing that his fiduciary duty to employer ceased with the issuance of the liquidation order because he had been retained by Reliance, Tr. at 6, and apparently he informed employer of this because negotiations between employer and Mr. Kawczynski ensued. No agreement was reached.

withdrawal violated not only the rules of professional conduct but also resulted in a denial of due process, as employer's interests were adversely affected. In this regard, employer contends the administrative law judge erred in declaring it to be in default and in issuing a default judgment against it, as the administrative law judge failed to consider the relevant factors for determining whether default is warranted. Finally, employer argues that the administrative law judge's decision is not supported by substantial evidence, as the record is devoid of any evidence supporting the award of permanent total disability benefits.

Claimant and the Director respond, urging the Board to affirm the administrative law judge's decision. The Director argues that the administrative law judge properly dismissed the motion to stay the proceedings, as Section 4 of the Act, 33 U.S.C. §904, provides that employer is primarily liable for claimant's benefits, and the insolvency of carrier is irrelevant to this responsibility. In response to employer's constitutional argument, the Director states that the Supremacy Clause, U.S. Const. art. VI, cl. 2, makes the Full Faith and Credit Act inapplicable, as the federal administrative law judge was under no obligation to honor the state's *request* for comity, as neither the Director nor claimant participated in the state proceedings, as there were no findings of fact or conclusions of law that would be entitled to full faith and credit, and as the Act's provision for quickly resolving claims outweighs the state's interest in delaying the claim. The Director also argues that the withdrawal of Mr. Kawczynski's representation, the dismissal of the motion for a stay and the finding of default were warranted in light of the circumstances, as employer chose not to attend the hearing and as it can file a motion for modification pursuant to Section 22, 33 U.S.C. §922, to change the outcome. Finally, the Director avers that the administrative law judge did not abuse his discretion in awarding permanent total disability benefits because claimant has the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption by virtue of his allegations, and employer has not rebutted the presumption. Claimant argues that employer violated the regulation controlling the filing of a request for continuance, 20 C.F.R. §702.337, and that, by failing to appear, employer waived all its defenses.

We need not address the parties' contentions regarding full faith and credit, as several of employer's remaining arguments have merit and require that we vacate the administrative law judge's decision. Initially, under the Board's standard of review, in order to be affirmed, the findings of fact and conclusions of law of the administrative law judge must be supported by substantial evidence of record, they must be rational, and they must be in accordance with law. 33 U.S.C. §921(b)(3); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *O'Keeffe*, 380 U.S. 359. The Board may only inquire into the existence of evidence to support the findings, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981), and a finding lacking the support of substantial evidence is not in accordance with law and must be set aside. *Director, OWCP v. General Dynamics Corp. [Fantucchio]*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986); *Southern*

Stevedoring Co. v. Voris, 190 F.2d 275 (5th Cir. 1951). Discretionary determinations are reviewed on an abuse of discretion standard. *See generally Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Evaluating the case at bar under this standard presents the initial question as to whether the administrative law judge's award is supported by substantial evidence. Because we conclude the administrative law judge's award is not supported by substantial evidence of record, it cannot be affirmed, and the case must be remanded.

Claimant, as the proponent of the award of permanent total disability benefits, must establish his entitlement by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Only after such a showing has been made does the burden shift to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The record in this case, however, contains no evidence supporting the administrative law judge's award of permanent total disability benefits. *See* 5 U.S.C. §557(c); 29 C.F.R. §18.57(b); 20 C.F.R. §702.348. Although claimant and the Director appeared before him, the administrative law judge did not receive or admit any documentary evidence into the record or hear any testimony. Rather, he based his declaration of default and his award of permanent total disability benefits solely on employer's absence from the proceedings. Without any evidence, it is impossible to determine whether claimant is entitled to permanent total disability benefits. We therefore vacate the administrative law judge's award and remand this case for the admission of evidence into the record and issuance of a decision based on the record. *Fantucchio*, 787 F.2d 723, 18 BRBS 88(CRT). Because we vacate the award of benefits, we also vacate the award of an attorney's fee.

The next question to address is whether the administrative law judge properly held employer to be in default and thus whether employer should be permitted to participate in the proceedings on remand. Employer first argues it should not have been required to attend the hearing because it should have been granted the requested stay. Alternatively, employer contends the administrative law judge erred in finding it in default merely because it did not appear before him and in failing to set

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[3]Contrary to the Director's argument that claimant has the benefit of the Section 20(a) presumption and that employer has not rebutted this presumption, the issue of whether claimant's condition is work-related was not in dispute before the administrative law judge. The Section 20(a) presumption does not apply to the question of the nature and extent of claimant's disability. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

aside the default in accordance with Rule 55(c) of the Federal Rules of Civil Procedure (FRCP) because it showed good cause for not appearing at the hearing.

Employer's alternate argument has merit, and we thus need not address whether it should have been granted the requested stay. Application of the proper standards for determining whether default is warranted leads to the conclusion that employer's failure to send a company representative to the hearing on the facts here is insufficient to warrant a declaration of default against it; rather, we agree with employer that issuing a default judgment was an overly harsh sanction in light of the circumstances presented. As no provision of the Act or its regulations, 20 C.F.R. Parts 701 and 702, addresses default, the general rules of practice for the OALJ are applicable. 29 C.F.R. §18.1. Section 18.39(b) of the OALJ Rules states:

> A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either (a) prior to the time for the hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause. . . . *A default decision, under §18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.*

[4]Employer also questions the propriety of allowing Mr. Kawczynski to withdraw from the case, especially in light of the adverse result of its being held in default for failing to appear. While the administrative law judge is not bound by technical or formal rules of procedure, in both New Jersey and Pennsylvania, the Rules of Professional Conduct provide that an attorney may withdraw if the withdrawal can be accomplished without "material adverse effect" to the client's interests. *Gilles v. Wiley, Malehorn & Sirota*, 345 N.J.Super. 119, 783 A.2d 756 (2001); N.J. R.P.C. 1:16(b); Pa. R.P.C. 1.16 (b). We note that carrier, and not employer, retained Mr. Kawczynski's services, and once carrier, the "client," went bankrupt, the interests of employer and carrier were no longer aligned.

29 C.F.R. §18.39(b) (emphasis added). Although this regulation empowers the administrative law judge to issue a default judgment, such authority is regulated by whether a party shows "good cause" for failing to appear. The same standard is used in FRCP 55(c): "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). Employer argues that the administrative law judge should not have entered a default judgment, pursuant to Section 18.39(b), and that he should have set the judgment aside on its motion for reconsideration pursuant to FRCP 55(c). We agree.

As stated above, Section 18.39(b), like FRCP 55(c), allows a party to avoid a judgment of default upon a showing of "good cause." The decision in *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90 (2d Cir. 1993), issued by the United States Court of Appeals for the Second Circuit, is instructive on the issue of "good cause." In *Enron Oil*, an individual former trader in the petroleum market appealed a default judgment against him wherein he was held jointly and severally liable with two co-defendants for a total of $257 million dollars. The district court entered a default judgment against the defendant because he failed to file an answer to an amended complaint within the time limits set by the FRCP. The defendant contended he was acting *pro se*, as his counsel had withdrawn, and that he did not receive the amended complaint. Upon receiving the pleading, the defendant promptly responded, but by then the court had issued the order directing a default judgment. *Enron Oil*, 10 F.3d at 92-95. The circuit court determined that the district court abused its discretion in failing to set aside the entry of default because the district court summarily dismissed the motion to vacate the judgment due to the untimely filing, but its order did not set forth the "good cause" factors that a district court is required to consider, nor did it address the defendant's reasons for not answering the amended complaint. The Second Circuit then concluded that the defendant established "good cause" by addressing each of the factors, and it vacated the default judgment. *Id.* at 97-98.

In discussing the discretionary aspect of a default judgment, the Second Circuit acknowledged there is a tension between clearing court dockets and doing justice, and it stated: "an understandable zeal for a tidy, reduced calendar of cases should not overcome a court's duty to do justice in the particular case." *Id.* at 96.

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[5]Section 18.5 (b), 29 C.F.R. §18.5(b), provides:

> Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the administrative law judge to find the facts as alleged in the complaint and to enter an initial or final decision containing such findings, appropriate conclusions, and order.

[6]Rule 60(b) sets forth non-clerical reasons for setting aside a judgment. Fed. R. Civ. P. 60(b).

Further, it stated that although default procedures are useful when confronted with an "obstructionist adversary," defaults are generally disfavored and should be used only on rare occasions. Where doubt exists as to whether the default should be granted or vacated, the outcome should favor the defaulting party. The Second Circuit also explained the criteria necessary to show "good cause." The fact-finder should consider: 1) whether the default was willful; 2) whether setting aside the default would prejudice the adversary; and 3) whether a meritorious defense is presented. Other factors listed by the court are: whether the failure to follow a rule or procedure was done in good faith and whether the entry of default would bring about a harsh result. *Id.* Finally, it stated that when a party held in default appears *pro se*, he should be afforded extra leeway, and judges should make some effort to protect his rights. Thus, the courts are admonished to grant default judgments sparingly and to set aside the entries of default freely. *Id.* at 95-96.

Relying on the "good cause" factors set forth in *Enron Oil*, employer states its actions were not willful because, although it had notice of the hearing and failed to appear, it made more than one attempt to have the proceedings continued, and it was unable to secure legal representation prior to the hearing date. Further, according to employer, Mr. Kawczynski had possession of the case file and did not give it to employer until after the decision was issued, and Mr. Kawczynski, who had been acting as its attorney, was not permitted to withdraw from the case until the hearing commenced. Employer also stated that claimant would not be prejudiced by setting aside the default judgment because he has received all benefits due until November 19, 2001, and he has already been paid in excess of $50,000 since the issuance of the administrative law judge's award. Further, discovery is complete, so no evidence will be lost by the delay, and the case is postured for either settlement or disposition on the merits. Finally, employer asserts it has a meritorious defense against a claim for total disability benefits, as it claims to have both medical and vocational evidence supporting a finding of partial disability.

Neither the administrative law judge's decision nor his order denying employer's motion for reconsideration addressed any "good cause" factors. Rather, the administrative law judge based his judgment solely on employer's failure to

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[7]Contrary to claimant's argument, employer's motion for a continuance faxed one business day before the hearing did not violate the regulations. Section 702.337(b), 20 C.F.R. §702.337(b), provides that "[u]nless the ground for the request arises thereafter, requests for continuances must be received by the Chief Administrative Law Judge at least 10 days before the scheduled hearing date, must be served upon the other parties and must specify the extreme hardship. . . ." Negotiations with Mr. Kawczynski were unsuccessful, and employer did not learn until two business days before the hearing that it was without counsel. Because these events occurred within 10 days of the hearing, the 10-day rule set forth in Section 702.337(b) does not apply.

appear at the hearing, and he summarily denied employer's motion for reconsideration. He did not make any findings of fact. Employer, however, made two attempts to postpone the hearing prior to the date scheduled. No party disputes the sequence of events which occurred, leaving employer without representation four days prior to the hearing, and no party disputes employer's efforts in attempting to retain Mr. Kawczynski, who had been involved from the outset. As employer's awareness of the denial of the request for comity and of its inability to retain Mr. Kawczynski as its representative occurred within seven days of the scheduled hearing, and as this information was conveyed promptly to the administrative law judge, we hold that it was erroneous for the administrative law judge to fail to address whether these reasons constituted "good cause" before issuing the default judgment. 29 C.F.R. §18.39(b). Employer's actions were not dilatory and at no time did employer concede its position.

Moreover, applying the "good cause" standard and relying on the factors set forth in *Enron Oil*, the only result supported by the record is that employer has shown good cause for not appearing at the hearing. This conclusion is particularly supported by the fact that employer became a *pro se* party due to the loss of its legal representative and the inability to reach an agreement with Mr. Kawczynski; under the decision in *Enron Oil*, *pro se* parties should be allowed greater leeway. As the Second Circuit stated, moreover, default is an extreme sanction and should be reserved for those situations involving an "obstructionist adversary." Employer's actions here cannot be characterized as those of an obstructionist but were undertaken in order to obtain counsel and to be heard. *Enron Oil*, 10 F.3d at 95-96. Under the Act the administrative law judge is bound by law to "best ascertain the rights of the parties," 33 U.S.C. §923(a), an obligation he cannot fulfill if either party has been summarily removed from the case.

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[8]The Board has applied similar reasoning in reviewing appeals involving dismissal of a claimant's claim, an action comparable in effect to declaration and entry of default against an employer. Thus, the Board has held that because dismissal is an extreme sanction, the fact-finder must consider whether lesser sanctions would better serve the interests of justice. *French v. California Stevedore & Ballast*, 27 BRBS 1 (1993) (dismissal of intervenor's claim was an abuse of discretion); *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989) (dismissal of claimant's claim improper where claimant missed last scheduled hearing but was prepared to proceed at prior hearings which were continued); *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989) (dismissal of claimant's claim improper where claimant missed depositions and medical examinations but administrative law judge did not discuss whether claimant's conduct was egregious in light of his explanations).

Accordingly, as a matter of law, we hold that employer has shown good cause for not appearing at the hearing. To hold otherwise is to punish employer for matters beyond its control. *Compare with Duran*, 27 BRBS 8 (employer's motion for reconsideration rationally denied due to employer's admitted negligence in failing to participate in the claim for over three and one-half years). Because employer has shown good cause for not appearing at the hearing, we hold that the administrative law judge erred in declaring default against it and in failing to set aside the entry of default on employer's motion for reconsideration. Consequently, we reverse the default judgment. We have already determined that this case must be remanded for the receipt of evidence and rulings based thereon on the merits of claimant's claim; therefore, we hold that employer may participate in the proceedings on remand. On remand, the administrative law judge must admit and consider evidence from both parties in deciding whether claimant is entitled to benefits for his injury.

[9]We reject the Director's argument that affirmance is proper because employer can have the judgment against it altered by filing a motion for modification. The Director's argument is in direct conflict with cases that frown on "back-door" litigation, *i.e.*, arguing those issues that should have been addressed at the first hearing. *See Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000); *but see Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002) (no limits on evidence that can reopen a claim under the Act). If employer's actions are so egregious that default is warranted, it is questionable whether employer would have grounds to reopen and re-litigate the claim. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); *see also Old Ben*, 292 F.3d 533, 36 BRBS 35(CRT). On the other hand, if reopening the claim were necessary to render justice under the Act, then requiring employer to do so via a motion for modification instead of resolving the issue in the initial instance is a waste of judicial resources.

Accordingly, the administrative law judge's Decision and Order awarding claimant permanent total disability benefits, Order on Motion to Reconsider, and fee award are vacated. The case is remanded for a hearing on the merits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge